IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8917 OF 2005

Purushottam Kacharabhai Waghela .... Petitioner

versus

Mahendra Mavji & anr. ... Respondents.

Shri S.M.Shetty for the petitioner
Shri P.S. Dani for the respondents.

CORAM; P.V. KAKADE, J.

DATED; FEBRUARY 06, 2006.

P.C:

1. Heard the learned counsel for both the sides.

Perused the records.

2. This petition is moved against the judgment and order passed by the lower appellate Court dated 10.08.2005 dismissing the appeal and confirming the order passed by the trial court dated 11-10-2000 in Misc. Notice No.347 of 1999 in Suit No. 518 of 1992 whereby the said notice was taken out by the present petitioner original defendant no.3 for setting aside the ex-parte decree dated 23-11-1998 holding that the said Misc. Notice was not maintainable and no sufficient cause was shown for condonation of delay and

setting aside the said ex-parte decree.

3. The respondents herein are the original plaintiff, who had filed the suit for eviction of defendants 1 to 3 under the provisions of the Bombay Rent Act on various grounds. The defendant no.3 took out Misc. Notice No.347 of 1999 seeking to set aside ex-parte decree passed on 23-11-1998 in the said suit. According to the defendant no.3, the suit was originally allotted to some other courts and subsequently it was transferred to court no.11. Ex-parte decree came to be passed in the aforesaid suit as the defendants had neither filed their written statement nor appeared before the court when the matter came up for hearing on 21-4-1999. The defendant no.3 was attending his duty at about 8.45 p.m. on that day, when he received a telephone message from his wife that bailiff had come for executing the decree in respect of the suit premises. At that time only, allegedly, he came to know about the passing of the order.

4. After hearing both the parties and perused the record, I am satisfied that the courts below have rightly held that the petitioner was not only negligent but appears that, either he has deliberately not bothered to enquire about fate of the matter or is grossly negligence in not even caring to contact his

advocate for a period of five years. Such a gross negligence cannot be said to be pardonable. This was observed by both the courts on the ground that it was submitted, that his advocate expired. However, the record shows that this fact was very much known to the petitioner. Moreover, even if it is considered that the defendant no.3 relied upon his advocate after service of summons upon him in February 1993, it does not stand to reason that defendant no.3 will not make any enquiry with his advocate for years together and would be reminded of the matter only when the bailiff came to execute decree. Suffice it to say therefore, I am satisfied that both the courts below have taken just and proper view of the matter and therefore no interference is called for.

5. In the circumstances, the petition has no merit and stands dismissed with no order as to costs.

6. At this stage, the learned advocate for the petitioner seeks sometime to vacate the suit premises. In view of the facts and circumstances, the petitioner has given time till 30th April 2006 to vacate the suit premises on condition that:

a) He and all added members of his family shall furnish undertaking to that effect to this court within two

weeks from the date of this order.

b) He shall not create any third party interest during the said period, and

c) He will not seek extension of further time to vacate the suit premises.

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